# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1909.**

---

## No. 126.

---

THE UNITY BANKING AND SAVING COMPANY,
APPELLANT,

vs.

GILBERT BETTMAN, TRUSTEE OF HOLZMAN & Co., BANKRUPTS, AND RICHARD FRITZ.

---

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

---

# SUPPLEMENTAL BRIEF FOR APPELLEE, RICHARD FRITZ.

---

THEODORE HORSTMAN,
*Counsel for Richard Fritz, one of the Appellees.*

**(21,108.)**

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

## No. 126.

THE UNITY BANKING AND SAVING COMPANY,
APPELLANT,

*vs.*

GILBERT BETTMAN, TRUSTEE OF HOLZMAN & COMPANY, BANKRUPTS, AND RICHARD FRITZ, APPELLEES.

## SUPPLEMENTAL BRIEF FOR APPELLEE, RICHARD FRITZ.

### As to the Forgery.

On pages 9, 10, 11, of our brief, we discussed the evidence to show that Mr. Fritz's signature to the power of attorney which was pinned to the "Carey stock" was forged. The evidence to establish the forgery was the direct evidence of Mr. Fritz, the evidence of numerous witnesses familiar with his signature, the comparison of that signature with other signatures of Fritz in the case which were known to be genuine (and which the referee found clearly showed the signature to the power of attorney to be a forgery), and other circumstances. No evidence whatsoever was offered by the "Unity Bank" tending to show the signature to the power of attorney to be genuine, but in appellant's brief it is argued at length that the sworn answer of the bank is the equivalent

of two witnesses and overcomes the above mentioned evidence for Mr. Fritz. As to the effect of the answer as evidence, we submit the following:

The answer of the "Unity Bank" to the amended petition says (Rec., 26): "That it *is informed and believes,* and therefore avers, that Richard Fritz deposited and left with Holzman & Co. the said fifty shares of stock and that he executed a blank power of attorney for the sale and transfer thereof," and also, "that Richard Fritz, himself, executed the said blank power of attorney, *or* authorized the said Holzman & Co., their agents or employees, to execute it for him or in his name."

It will be observed that the allegations of the answer are *in the alternative, and on information and belief,* and by an affiant who does not claim to have any personal knowledge as to the Fritz signature.

1 Beach on Modern Equity Jurisprudence, Section 389: "As to the quantum of evidence required to overcome a sworn answer in equity, the law, as laid down by the Supreme Court of Vermont, squares with common sense and is kin to the proposition that two and two makes four (49 Vermont, 270, 277, Vaile *v.* Blodgett), but the rule, as often announced, respecting the effect of the answer as proof, is, we think, misleading, as a careful examination of the authorities will show. The weight of evidence does not depend upon the number of witnesses that depose to given facts. The burden of proof, when an answer is responsive to a bill, devolves upon the orator to satisfy the trier that such answer is untrue; but this burden may sometimes be discharged by documentary proof or circumstantial evidence without deposition of any witness testifying to the facts set out in the bill. It is obvious that a sworn answer responsive to the bill, stands as a deposition of one witness and if encountered by one witness testifying in contradiction and no circumstances appear affecting the case, no preponderance of proof is made out on either side and the orator must fail, because

the burden of proof is upon him. But the answer, considered as evidence, is to be weighed precisely as it would be if it appeared in a deposition disconnected from the defendant's pleading; and the fact that the defendant is interested in the event of the suit has the same effect of discrediting his story that it does in an ordinary case at law. Again, if the answer is evasive or equivocating it lessens its force as evidence, precisely as such circumstances impair the story of a witness told on the witness stand. In short, the answer when used as evidence, is subject to the same proper criticism and the same legal infirmities that attach to all evidence in whatsoever form it is introduced in court. All the orator is bound to do is to meet and overcome the answer by competent proof. This proof may require one or twenty witnesses; it may be made without any. The authorities all agree that the answer is evidence only when it is a direct and explicit denial of the allegations made in the bill. *If it denies such allegations on information and belief it is not evidence.* If the defendant sets up other matters in confession and avoidance of the charges made in the bill, such other matters are not evidence. Such allegations in the bill are mere pleading, and if relied on by the defendant, must be made out by proof if the answer is traversed.' "

97 Fed. Rep., 696, Savings Society *v.* Davidson, Syl. 4: "The rule that two witnesses or one witness and corroborating circumstances are required to overcome a sworn answer asserting a fact responsive to the bill *does not apply where the reason upon which it is based fails,* as when the answer is by a corporation and is verified by the oath of one who *has no personal knowledge* of such fact, or where in case of an answer made by an individual, his testimony as a witness, shows that he did not have such personal knowledge, or is in conflict with the answer."

100 Fed. Rep., 817, Hanchett *v.* Blair, Syl. 1: "A denial expressly *based on want of knowledge, information, or belief,* although contained in the sworn answer, is not evidence in

the case and its only effect is to require the complainant to make some proof on the point."

In 4 Howard, 185, Carpenter *v.* Insurance Co., cited by appellant, the court said: "We see no reason why an answer by a corporation *under its seal* and sworn to by the proper officer *with some means of knowledge* on the subject, should not *generally* impose an obligation on the complainant to prove the fact by more than one witness. Here the denial of the corporation is *explicit and responsive to the bill.*"

1 Foster's Federal Practice, Section 151: "The answer by a corporation must be under its corporate seal." The answer of the Unity Bank was not under its corporate seal.

## As to the Demurrer of the Bank.

The demurrer of the "Unity Bank" to the amended petition of Mr. Fritz was a general demurrer.

1 Beach Modern Equity Practice, Section 231, defines general and special demurrers.

Section 239 states what objections are not covered by a general demurrer.

1 Foster's Fed. Practice, Section 115: "The particular defects or objections must be pointed out by the demurrer when the objections are to a defect of the bill in point of form."

Story's Equity Pleading, Section 455: "By the rules of courts of equity every demurrer is required to contain the causes thereof and they must be set down with reasonable certainty and directness."

Street's Federal Equity Practice, Section 936: "A special demurrer must always be used when the defect to be relied on is one of mere form. It must also be used to get the benefit to a defect not absolutely destructive of the equity of the bill."

## As to the Amended Petition and Reply.

Section 95, 1 Beach Mod. Eq. Prac., states the general principles of equity pleading and says:

"The same precision of statement that is required in pleadings at law has never been attained in equity pleadings." * * * "Certainty of a common intent is all that is ordinarily required."

4 Johnson's Chancery Reports (N. Y., 435), Hood *v.* Inman:

"Pleadings should consist of averments or allegations of facts stated with as much brevity and precision as possible, not of inferences or argument."

"Impertinences in pleading consist in setting forth what is not necessary to be set forth, as stuffing them with recitals and long digressions as to matter of fact not material."

"Generally the bill and answer ought not to set forth deeds in *hæc verba* but so much of them only as is material to the point in question; nor should they be argumentative or rhetorical."

1 Foster's Federal Practice, 359, section 156: If a specific replication should not have been filed, the filing of it is non-prejudicial error. "The proper course is for the defendant to move the special replication off the file."

104 U. S., 658: "General certainty in pleading is sufficient in pleading in equity."

## As to Jurisdiction of Referee.

The case *ex parte* First National Bank of Chicago, 207 U. S., 61, has no application. In the case at bar jurisdiction was *consented to*, and the *res* was put in the hands of the court. In 198 U. S., 280 (the case referred to in 207 U. S., 61), there was a summary proceeding, and the parties (p. 289) expressly objected to the jurisdiction of the district court, while the case at bar is a plenary proceeding, consented

to by all parties, and the *res* was put into the hands of the court. Before anything was done with regard to the matter the referee refused absolutely to consider the matter until his jurisdiction was consented to and the certificate was physically placed in possession of the court.

The leading case, perhaps, on jurisdiction of this kind, is White *v.* Schloerb, 170 U. S., 542: "After an adjudication in bankruptcy an action in replevin in a State court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication and in the possession of the referee in bankruptcy at the time when the action in replevin was begun; and the district court of the United States, sitting in bankruptcy, has jurisdiction by summary proceedings, to compel the return of the property seized."

## As to Jurisdiction on Appeal.

198 U. S., 280, First National Bank *v.* Title & Trust Co. (p. 288): "If the proceeding in the District court was a proceeding in bankruptcy, and not an independent suit, no appeal will lie to the Circuit Court of Appeals, and the jurisdiction of that court was confined to revision in matter of law on notice and petition under clause *b* of section 24."

Respectfully submitted,

THEODORE HORSTMAN,
*Attorney for Richard Fritz.*